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NOTES.

FAILURE TO FURNISH MEDICAL ATTENDANCE TO A MINOR.—The law as to the practice of Christian Science and kindred forms of mental healing involves some interesting problems and is still in the making. Any decision bearing on it creates wide interest as is evidenced by the reception of the recent case of *The People of the State of New York* v. *Pierson* (1903) 30 N. Y. Law Journal 247. The Court of Appeals held that a parent or guardian may be convicted who, when a child under his care is dangerously ill, wilfully neglects to summon to its aid a physician, that is a person who is duly admitted to practice medicine under the laws of the State. It is not enough to employ the services of a spiritual or mental healer. The indictment had been brought under § 288 of the New York Penal Code which provides that a person who "wilfully omits, without lawful excuse, to perform a duty by law imposed upon him, to furnish food, clothing, shelter or medical attendance to a minor * * * is guilty of a misdemeanor." It seems that this is the first time that such a question has been raised in this country in a court of higher resort. In England several convictions under statutes have been upheld. At common law, in spite of dicta to the contrary, the better opinion is that a parent was under no obligation to furnish medical attendance to his child. *Reg.* v. *Wagstaffe* (1868) 10 Cox Cr. Cases 530. The first statute was that of 31 & 32 Victoria cap. 122 § 37 (1868), which enacted, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child, being under his custody, under the age of fourteen years, whereby the health of such child

shall have been or shall be likely to be seriously injured, he shall be guilty of an offense punishable on summary conviction." Under this statute an indictment for manslaughter was brought against a parent, one of a sect called the Peculiar People, who had neglected to provide medical aid for his child, by reason of which neglect the child died. The conviction was affirmed by the Court of Criminal Appeal. The words of Lord Coleridge are in point. "To cause death by culpable neglect is manslaughter and the neglect on the part of the prisoner which caused death was a wilful disobedience of the law, a wilful neglect of the duty imposed by statute. It was therefore culpable neglect." *Reg.* v. *Downes* (1875) L. R. 1 Q, B. Div. 25.

In this country while it has been long established that a legislature under its police power may enact laws regulating the practice of medicine, what constitutes such practice is somewhat unsettled. The question arises in actions by the State against alleged illegal practitioners, and in suits to recover for services, rendered by persons who have not complied with the State regulations applicable to physicians, when the court must determine whether the services were legally rendered. In some jurisdictions it has been held that the practice of osteopathy is not the practice of medicine within the meaning of the statute. *Nelson* v. *Board of Health* (1900) 108 Ky. 769; *Smith* v. *Lane* (1881) 24 Hun 632. The decisions upon Christian Science are conflicting and each interpretation turns largely upon the statute of the particular State. In *State* v. *Mylod* (1898) 20 R. I. 632 the defendant, a Christian Scientist, was charged with practicing medicine without a license. The court held that the teaching of the principles of Christian Science and the attempt to cure by words of encouragement and prayer for divine assistance was not the practice of medicine and discharged the defendant. In Nebraska the statute is much broader in its terms. "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another * * *." Nebraska Laws of 1891, cap. 35. Under this statute a conviction for illegally practicing medicine was secured though the evidence was similar in character to that in the case of *State* v. *Mylod*, supra. *State* v. *Buswell* (1894) 40 Neb. 158. The New York Public Health Law does not define the term "practice of medicine."

It would seem that the statute on which the principal case is based being intended to protect the life and health of children is well within the police power of the State. The case suggests several interesting questions, along the same line, that the law may find more difficulty in answering, Could the legislature so broaden the scope of § 288 as to cover adults or would this be an unwarranted invasion of personal liberty? See the opinion of PECKHAM J. in *American School of Magnetic Healing* v. *McAnnulty* (1902) 187 U. S. 94. Assuming that the legislature might make it a misdemeanor for a person who professes to heal by mental or Christian

Science to take the entire charge of a child in a case of serious illness, to the exclusion of a regular physician, would the police power warrant the extension of such a provision to the case of adults in other than infectious diseases? Again, as the law stands to-day could the same result be reached in New York under § 193 of the Penal Code, which provides that culpable negligence is a cause of manslaughter, as was reached by Lord Coleridge in *Reg.* v. *Downes*, supra?

THE STATUTE OF FRAUDS AND THE SCOPE OF THE GENERAL DENIAL.—Two recent cases, allowing advantage to be taken of the Statute of Frauds under the general denial, are illustrative of the persistence of the influence of the precedents of common law pleading even under a reformed procedure. *Indiana Trust Co.* v. *Finnitzer* (Ind. 1903), 67 N. E. 520; *Rief* v. *Rube*, (Nebr. 103), 94 N. W. 517. The result reached seems unsound both in the scope given to the general denial and in the interpretation in effect put upon the Statute of Frauds. The original scope of the general issue was to traverse only the essential allegations of the declaration, which in actions of assumpsit were merely the essential elements of the formation of a contract. By arbitrary extension this plea later permitted the introduction of matter showing that such contract was void in law, owing to illegality, usury, coverture, etc., and also, purely personal defences which would render it merely voidable. The Hilary Rules and Judicature Acts remedied this vice by confining the plea to its logical office of a denial of the essential allegations of the declaration and reserving for special pleas all matter rendering the contract either void or voidable. There seems no valid reason for giving to the general denial, which under the reformed procedure has taken the place of the general issue, any more than this its logical effect. It is clearly improper, then, to allow the Statute of Frauds to be taken advantage of under this plea for, whatever else may be the effect of the Statute, it certainly does not make conformity with its provisions an element in the formation of the contract and so a necessary allegation of the declaration. If the oral agreement precedes the requisite writing the contract is treated as made on the earlier date both in law and equity. Following the Common Law rule and in disregard of these principles and of the seeming intention of the Hilary Rules, the defendant was allowed in *Buttemere* v. *Hayes* (1839) 5 M. & W. 456, to take advantage of the Statute under the general issue and this error was only remedied in England by the Judicature Acts. The influence of this decision seems largely reponsible for the result in the principal cases.

Even where improperly broadening the scope of the general denial, real defences are allowed thereunder, the Statute of Frauds cannot properly be raised, for the better view is that it is a personal and not a real defence. To be sure, in allowing a demurrer, where non-compliance with the Statute appeared upon the face